Supreme Court, U.S.
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No. 98-25

In The

Supreme Court of the United States

October Term, 1997

FLORENCE HICKS ALEXANDER, Ph.D., an Individual,

Petitioner,

vs.

MICHAEL BOWERS, in his official capacity as Attorney General of the State of Georgia, LEWIS MASSEY, in his official capacity as Secretary of State of the State of Georgia, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Georgia Supreme Court

PLAINTIFFS'/RESPONDENTS' BRIEF IN OPPOSITION

LEO J. KIGHT, JR.
Counsel of Record
SULLIVAN & KIGHT,
Attorneys at Law, LLC
Attorneys for Plaintiffs/Respondents
13 North Lee Street
Suite 1000
P.O. Box 816
Forsyth, Georgia 31029-0816
(912) 994-5151

147599

(800) 274-3321 • (800) 359-6859
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APPENDIX

Appendix A — Excerpts From April 30, 1997, Hearing Transcript 1a

OPINIONS AND ORDERS BELOW

The Plaintiffs/Respondents acknowledge that the statement of Opinions and Orders Below contained in the Petition [Petitioner's Brief, pages 1-2] is an accurate and complete representation.

STATEMENT OF JURISDICTION

A. The interlocutory injunction order was granted by the Superior Court of Monroe County, State of Georgia, on June 2, 1997, *nunc pro tunc* to May 23, 1997.

B. The Georgia Supreme Court rendered its opinion affirming the trial court's decision, with all justices concurring, on February 23, 1998. Petitioner's motion for reconsideration was ordered dismissed on April 2, 1998. Petitioner's second motion for reconsideration was ordered not allowed filed on April 16, 1998.

C. Plaintiffs/Respondents deny that jurisdiction is proper on the basis of 28 U.S.C. § 1251(b)(3) as there appears to be no attempt by the Petitioner to invoke the Court's original jurisdiction (i.e., compliance with Supreme Court Rule 17, Procedure in an Original Action) other than by this one-time statutory citation in the Petition [Petitioner's Brief, page 2], nor would it be appropriate in this instance. Plaintiffs/Respondents further deny that jurisdiction is proper on the basis of 28 U.S.C. § 1257(a) as the Petition appears to be untimely and further that there is a lack of finality of decision, as more fully set out below.

ERRORS AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner has substantially misrepresented to this Court essential material facts in the underlying case and the state court appeal thereof, either by direct misstatement or omission, the most blatant examples of which are set forth hereafter:

Petitioner omitted from her Statement of Facts the allegations by Joyce Oatman and the State of Georgia, which provided the basis for their intervention motions. These allegations were that Petitioner had breached her fiduciary duty to Ebon Foundation by her mismanagement, misappropriation, and commingling of corporate assets. These allegations are contrary to Petitioner's assertion that she is the fee simple owner of the property in dispute [Petitioner's Brief, page 4], which is one of the main contentions raised by Ms. Oatman and the State of Georgia in the underlying civil action. These allegations also are contrary to Petitioner's assertion that the closure of Ebon Academy was due to its unsuccessful fund raising activities, parents' failure to pay tuition and low student enrollment [Petitioner's Brief, page 6], which is one of the main contentions raised by Plaintiffs/ Respondents in the underlying civil action.

Petitioner asserts in her Statement of Facts that she first learned of the granting of the temporary restraining order (TRO) several days after it was granted [Petitioner's Brief, page 7]. However, the record of the underlying civil action is devoid of any documentary evidence or testimony to support this assertion.

Petitioner asserts in her Statement of Facts that the offer to purchase the campus by the General Missionary Baptist Convention was unsolicited and occurred several weeks after the alleged termination of the lease between Petitioner and Ebon

Foundation [Petitioner's Brief, page 6]. However, the record of the underlying civil action is devoid of any documentary evidence or testimony to support these assertions.

Petitioner asserts in her Statement of Facts that a letter terminating Ms. Oatman from the board of Ebon Foundation was sent to Joyce Oatman on February 20, 1997 [Petitioner's Brief, page 7]. However, Petitioner omits from her Statement of Facts that Ms. Oatman denied having ever received the letter. Furthermore, Petitioner omits from her Statement of Facts that evidence was presented that Ebon Foundation had in fact sent the letter to Ms. Oatman by overnight mail on April 24, 1997, the same day on which Ms. Oatman had sought the *ex parte* intervention and TRO. *See Appendix "A," Hearing Transcript of the Superior Court for Monroe County, Georgia.*

Petitioner asserts in her Statement of Facts that she requested the Monroe County Superior Court to conduct a hearing immediately after learning of the TRO, due to the impending closing date for the sale of the campus [Petitioner's Brief, page 7]. However, the record of the underlying civil action is devoid of any documentary evidence or testimony that supports Petitioner's assertion that she made known to the court the problem with the impending closing date prior to the scheduled April 30, 1997, hearing.

Petitioner asserts in her Statement of Facts that the Georgia Superior Court Judge only heard evidence at the April 30, 1997, hearing concerning the issue as to whether or not Ms. Oatman should be allowed to intervene [Petitioner's Brief, page 8]. However, Petitioner omits from her Statement of Facts that this issue was the sole issue that Petitioner chose to raise at the April 30, 1997, hearing. *See Appendix "A," Hearing Transcript of the Superior Court of Monroe County, Georgia.*

Petitioner asserts in her Statement of Facts that the Monroe County Superior Court modified the TRO at the conclusion of the April 30, 1997, hearing to only allow Petitioner to sell the property to the defunct purchaser, the General Missionary Baptist Convention, and only under the expired contract, and goes on to assert that the General Missionary Baptist Convention informed her that they would not be purchasing the property because the contract had expired [Petitioner's Brief, page 8]. However, the record of the underlying civil action is devoid of any documentary evidence or testimony that supports Petitioner's assertions that as of that date the General Missionary Baptist Convention had refused to purchase the property or that they considered the sales contract expired.

Petitioner asserts in her Statement of Facts that at the May 22 and 23, 1997, hearings the Monroe County Superior Court ruled that the interlocutory injunction would remain in place prior to giving Petitioner an opportunity to present evidence [Petitioner's Brief, pages 8-9]. This is simply not true, as the record of the underlying civil action reflects that Petitioner was given a full and fair opportunity to present evidence at all stages of the proceedings.

Petitioner asserts in her Proceedings Below that the Georgia Supreme Court denied both her first and second motions for reconsideration [Petitioner's Brief, page 12]. The record of the underlying civil action reflects that Georgia Supreme Court dismissed Petitioner's first motion for reconsideration [Order, Appendix "H," page 50a] and ordered the Clerk of the Court to not allow the filing of Petitioner's second motion for reconsideration [Order, Appendix "I," page 51a].

REASONS FOR DENYING THE WRIT

There are no compelling reasons to review the Georgia Supreme Court decision on writ of certiorari, and multiple reasons for denying the writ:

(a) The Petition is untimely filed under Supreme Court Rule 13;

(b) The Georgia Supreme Court's ruling regarding the granting of the interlocutory injunction is not final insofar as a right to an appeal to the United States Supreme Court is concerned, as required by 28 U.S.C. § 1257(a);

(c) There are essential facts misstated by Petitioner which change the nature of the legal issues raised by Petitioner;

(d) The alleged conflict with the Georgia Supreme Court's ruling with prior United States Supreme Court decisions is illusory; and

(e) The right and fair result was reached by the Georgia Supreme Court.

Therefore, no constitutional challenge is properly presented for review by this Court.

ARGUMENT

I.

THE PETITION IS UNTIMELY FILED UNDER SUPREME COURT RULE 13.

Supreme Court Rule 13.1 requires that a petition for writ of certiorari to review a judgment of a state's highest court is to be filed within 90 days after the entry of judgment. Considering

this rule alone, this Petition would be untimely filed if based upon date of the Georgia Supreme Court's judgment.

Supreme Court Rule 13.3 provides that a party's filing of a timely petition for rehearing with the lower court will toll the time for filing until the petition for rehearing is granted or denied. Plaintiffs/Respondents argue that presupposed within this rule is a requirement that the petition for rehearing must also be properly filed; that is, accepted by the lower court as a validly submitted pleading in order for Petitioner to avail herself of the tolling aspect of Supreme Court Rule 13.3.

In this case, the Georgia Supreme Court *dismissed* [emphasis added] Petitioner's first motion for reconsideration, and did not *deny* [emphasis added] the motion as alleged by Petitioner. Although the Georgia Supreme Court gave no expressed reasons for the dismissal, it is relevant to note that the Petitioner's first motion exceeded the Georgia Supreme Court's rules on page limitations for motions and, in addition, contained hundreds of pages of extraneous documentary evidence in further violation of the rules. The Petitioner's second motion for reconsideration was *not allowed filed* [emphasis added] by the Georgia Supreme Court, and they did not *deny* [emphasis added] as alleged by Petitioner. Since it would appear that neither one of Petitioner's motions for reconsideration were validly filed with the Georgia Supreme Court, the operative event for this Petition's filing deadline would be the date of the Supreme Court of Georgia's decision, that being February 23, 1998. This Petition was filed with the Court on June 30, 1998; which is 37 days after the 90 day deadline required by Rule 13.1; thus, this Petition is untimely filed and should be dismissed.

II.

THE JUDGMENT OF THE GEORGIA SUPREME COURT LACKS FINALITY OF DECISION FOR THE PURPOSE OF APPEAL TO THIS COURT.

In order for this Court to have appellate jurisdiction pursuant to Petitioner's citation of 28 U.S.C. § 1257(a), the underlying decision by the state's highest court must have the requisite finality of decision for the purpose of appeal. *See, e.g., Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1956).

This Court has on numerous occasions applied the principle of finality of decision to the specific area of the appellate review of temporary and interlocutory injunctions. These cases focused upon whether the decision by the state's highest court regarding the injunctions had the practical effect of deciding the underlying merits of the case. Thus, in the case of *Moses v. Mayor*, 15 Wall. 387 (1872), it was held that a state court's decision to dissolve an injunction lacked finality of decision in that it left unresolved the underlying merits of the case. This rationale was carried forward in *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 343 U.S. 962 (1951), where a writ of certiorari was granted but later dismissed as improvidently granted in 344 U.S. 178, because the injunction involved was only temporary and hence not the final judgment which the Court had the power to review. This was so even though, as long as a temporary injunction is in force, it may be as effective as a permanent injunction.

An example of when the Court has granted review of a decision involving an interlocutory injunction is found in *Construction & General Laborers' Union v. Curry*, 371 U.S 542 (1963), where the Court found finality of decision in the ruling of the Georgia Supreme Court reversing a Georgia

Superior Court's ruling refusing to issue an interlocutory injunction in a labor dispute. The Court refused to apply the standard outlined in *Montgomery, supra.*, but only because the issues involved a labor dispute and a substantial claim was made that the jurisdiction of the state court was preempted by federal law. Another example is found in *Board of Commissioners v. Lucas*, 93 U.S. 108 (1876), where the Court found that review of a temporary injunction had the requisite finality when the state supreme court also directed the inferior court to dismiss the underlying complaint, thus making a final disposition of the case.

Applying these decisions to this Petition, it becomes apparent that the decision by the Georgia Supreme Court to affirm the interlocutory injunction of the lower court lacks the requisite finality of decision. The decision in no way decides the underlying merits of the allegations that are the subject matter of the interventions by Joyce Oatman or the State of Georgia. The truth or falsity of their allegations that Petitioner committed mismanagement, misappropriation and commingling of corporate assets remains yet to be decided in the lower courts.

III.

THE PETITIONER HAS MISSTATED AND/OR OMITTED FACTS WHICH CHANGE THE NATURE OF THE LEGAL ISSUES RAISED BY PETITIONER.

Petitioner mistakenly alleges that Joyce Oatman's request for an *ex parte* TRO failed to comply with O.C.G.A. § 9-11-65(b) in that no facts showing immediate and irreparable harm are shown by affidavit or verified complaint, thus violating Petitioner's due process rights [Petitioner's brief, pages 15-16]. This is simply not true, as the Georgia Supreme Court (with the benefit of the entire underlying record) found Ms. Oatman's verified complaint for a TRO in fact satisfied the requirements

of O.C.G.A. § 9-11-65(b)(1) [Opinion, Petitioner's Appendix "A," page 6a].

Petitioner further alleges that the hearing conducted by the Monroe County Superior Court on April 30, 1997, was not meaningful in that it was held after the expiration of the contract to sell the property [Petitioner's brief, page 18]. However, Petitioner omits the key fact that the April 30, 1997, hearing date was requested by Petitioner and the underlying record is devoid of any attempt by Petitioner to raise the issue of the April 28, 1997, closing date for the sale of the campus and the need for a earlier hearing date.

Petitioner further alleges that Monroe County Superior Court judge was "biased," citing several areas of the underlying record for support [Petitioner's Brief, pages 19-20]. However, a closer examination of the record reveals that this contention is meritless:

1. Petitioner alleges that she was not allowed to present evidence concerning the TRO at the April 30, 1997, hearing [Petitioner's Brief, page 19]. An examination of the underlying record reveals that the court fully examined the only contention that Petitioner brought before it — a challenge to Joyce Oatman's standing to intervene and request the issuance of a TRO. *See Appendix A, Hearing Transcript of the Superior Court for Monroe County, Georgia.* Petitioner had a full opportunity to challenge the merits of Ms. Oatman's allegations that supported the granting of the TRO, yet chose to not pursue the matter at that time.

2. Petitioner improperly characterizes the record, by selective citation, concerning the May 22, 1997, hearing [Petitioner's Brief, pages 19-20]. The first

record citation is the court's comments at the conclusion of the evidence presented by the State of Georgia concerning the commingling of corporate and private funds. The matter had been fully presented, and the first record citation reflects the court's ruling that the injunction would be extended to those bank accounts. The second record citation reflects the court's decision after Petitioner again raised the issue of the continuation of the injunction as to the campus property, which due to the late hour the court deferred making a decision until the hearing to be held the next day. At no time was Petitioner not allowed to present her case prior to the court's ruling.

3. Petitioner again improperly characterizes, by selective citation, the record concerning the May 23, 1997, hearing [Petitioner's Brief, page 20]. The record citation reflects the court's comments after a lengthy and thorough presentation by the Petitioner concerning her objection to the continuation of the injunction as to the campus property. The court is indicating at this point, having given the Petitioner full opportunity to present her case, that the court was not inclined to rescind the interlocutory injunction. The only parties "denied" an opportunity were the Respondents, whose desire to cross-examine the Petitioner in rebuttal were deemed unnecessary by the court since the court had decided to leave the interlocutory injunction in place.

Petitioner further improperly alleges that the present status of the interlocutory injunction is a taking without just compensation in violation of the Fifth and Fourteenth Amendments [Petitioner's Brief, pages 22-25]. Specifically, Petitioner alleges that she is currently restrained from selling the campus property to anyone other than the General

Missionary Baptist Convention. This is simply not true, as the underlying record clearly reflects that the Petitioner may market and sell the property to anyone she chooses, subject only to the approval of the Monroe County Superior Court [Transcript, Appendix "D," page 29a].

IV.

THE ALLEGED CONFLICT OF THE GEORGIA SUPREME COURT'S RULING WITH PRIOR UNITED STATES SUPREME COURT DECISIONS IS ILLUSORY.

The Petitioner argues that Georgia Supreme Court's decision affirming the Georgia Superior Court's decision to grant a temporary restraining order on an *ex parte* basis violates this Court's long standing body of case law, citing *Cleveland Board of Education v. Loudermill*, 407 U.S. 532 (1985); *Fuentes v. Parham*, 407 U.S. 67 (1972); *Carroll v. President and Commissioner of Princess Anne*, 393 U.S. 175 (1968), and further citing the United States District Court, District of Massachusetts, in *Krohn-Hite Corporation v. Berube*, 372 F. Supp. 1262 (D. Ma. 1974). However, upon closer examination clearly each of these cases are distinguishable from the present case:

1. In *Loudermill*, 470 U.S. at 535, the case involved two city employees' termination from employment without an opportunity to respond or challenge their dismissal prior to removal. The Court held that due process required a pretermination opportunity to respond, employing a balancing test of the competing interest of the employees' property rights in their employment versus the governments need for expeditious removal of unsatisfactory employees and avoidance of administrative burdens. *Id.* at 542-545. Lacking in

the factual scenario was the aspect of irreparable harm to the government should it not be able to immediately terminate the employees.

2. In *Fuentes*, 407 U.S. at 69-70, the case involved the constitutionality of statutory pre-judgment replevin provisions which could be used to obtain an *ex parte* writ against the purchasers of household goods who had defaulted under their conditional sales contracts. The Court held that due process required an opportunity for hearing before the seizure of another's property, noting that the broadly drawn Florida and Pennsylvania statutes served no important state interest that would justify a summary seizure. *Id.* at 94-96. Again lacking in this factual scenario was the aspect of irreparable harm that would have justified the *ex parte* procedure.

3. In *Carroll*, 393 U.S. at 176-178, the case involved the constitutionality of an *ex parte* restraining order that restrained members of a white supremacist group from conducting public rallies. The Court held that the *ex parte* restraining order was improper because there was no showing that is was impossible to serve or notify the restrained parties and give them an opportunity to respond. *Id.* at 182-183. Again lacking in this factual scenario was the aspect of irreparable harm.

4. In *Krohn-Hite*, 372 F. Supp. at 1263, the case involved whether the underlying record reflected sufficient allegations of irreparable harm to justify the issuance of an *ex parte* restraining order. The court made a determination that there was not a factual basis for a finding of irreparable harm. *Id.* at 1264. Compare to

> the instant case, in which not only the trial court but the Georgia Supreme Court found that there was compelling evidence of irreparable harm from the commingling of the Petitioner's personal assets with those of the corporations and the impending sale of all by Petitioner [Opinion, Appendix "A," page 6a].

In each of the cases relied upon by Petitioner, the distinguishing factor is that there was no showing of irreparable harm to justify the deprivation of a property right without notice. In the instant case, both the trial court and the Georgia Supreme Court rightfully held that Ms. Oatman had properly raised and supported by evidence her allegation of irreparable harm, thus the *ex parte* TRO and resulting interlocutory injunction after full opportunity for hearing is in compliance with constitutional due process requirements.

V.

THE RIGHT AND FAIR RESULT WAS REACHED BY THE GEORGIA SUPREME COURT.

In the final analysis, the bottom line is this — the right and fair result in the underlying action was reached by both the Monroe County Superior Court and the Georgia Supreme Court:

1. The interventions of Joyce Oatman and the State of Georgia, although granted *ex parte*, were granted conditionally and subject to any properly supported objections by the Petitioner. Within six days of the *ex parte* granting of the interventions, Petitioner was given a full opportunity to raise objections, which she did, and which the trial court subsequently denied. The trial court's decision to allow the interventions was fully supported by the record that reflected that

the claims of Ms. Oatman and the State of Georgia were not being adequately represented by the Plaintiffs/ Respondents, thus met the requirements for intervention under Georgia law.

2. The temporary restraining order was granted *ex parte* after a showing was made by Ms. Oatman that immediate and irreparable injury would result. A full hearing regarding the injunction was held within 30 days pursuant of Georgia law; in fact, a partial hearing on the matter was held at the request of the Petitioner within 6 days of the issuance of the TRO, in accordance with Georgia law. O.C.G.A. § 9-11-65(b)

3. The temporary restraining order was properly converted into an interlocutory injunction after Ms. Oatman and the State of Georgia showed that there was substantial commingling of corporate and personal assets by Petitioner.

CONCLUSION

For the reasons given above, Plaintiffs/Respondents, therefore, urge this Court to deny the writ petitioned for in this case.

Respectfully submitted,

LEO J. KIGHT, JR.
Counsel of Record
SULLIVAN & KIGHT,
Attorneys at Law, LLC
Attorneys for Plaintiffs/Respondents
13 North Lee Street
Suite 1000
P.O. Box 816
Forsyth, Georgia 31029-0816
(912) 994-5151